



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 27, 1998

Mr. Ryan Tredway
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0817

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113584.

The Texas Department of Insurance (the "department") received a request for

a copy of Case File #37219 and any accompanying correspondence, notes, etc., regarding the reprimand and fine recently imposed against AIA Insurance Agency. . . particularly . . . the name of the complainant and any correspondence, telephone records, or notes relative to why the Texas Department of Insurance imposed this fine and reprimand against AIA. . . .

You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and the attorney work product doctrine. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.111 excepts from disclosure interagency or intraagency communications "consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5; *see also* Open Records Decision No. 631 (1995) at 3.

¹We assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You contend the submitted documents are excepted from disclosure under section 552.111 both as attorney work product and as internal memoranda. We consider first whether the documents constitute work product. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111. For information to be considered "attorney work product," a governmental body must first show that the information was created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

See National Tank Co. v. Brotherton, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

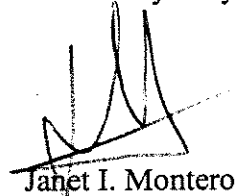
Second, the governmental body must show that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* You state that the information at issue was developed in preparation of litigation involving an enforcement action referred from the Advertising Section of the department. We have reviewed your markings and conclude that you have demonstrated how these documents meet the requirements set forth in *National Tank* and Open Records Decision No. 647 (1996). Therefore, the department may withhold the marked portions as attorney work product under section 552.111.

Now we consider whether the other submitted documents are excepted from disclosure under section 552.111 as internal memoranda. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We have marked those portions of the submitted documents that constitute drafts within the context of the department's policymaking processes. The department may withhold the marked documents from disclosure under section 552.111.

You also assert the information is protected under section 552.107(1) which provides an exception from disclosure for information that "an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." This provision excepts information within the attorney-client privilege that contains legal advice, legal opinion, or that reveals client confidences. Open Records Decision Nos. 574 (1990), 462 (1987) at 9-11. We note that some of the information for which you asserted section 552.107(1) protection is already excepted under section 552.111, consequently, you may withhold the remaining documents under section 552.107(1).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', with a horizontal line drawn through the middle of the signature.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 113584

Enclosures: Submitted documents

cc: Mr. Tom Duck
Executive Director
Texas Rural Water Association
1616 Rio Grande
Austin, Texas 78701
(w/o enclosures)